

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	File No: EB-11-SJ-0003
)	
Ayustar Corporation)	NAL/Acct. No.: 201132680002
)	
San Juan, PR)	FRN: 0008739229
)	
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: July 29, 2011

Released: July 29, 2011

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (“*NAL*”), we find that Ayustar Corporation (“Ayustar”), operator of an Unlicensed National Information Infrastructure (“U-NII”) transmission system in Santurce, Puerto Rico, apparently willfully and repeatedly violated sections 301 and 302(b) of the Communications Act of 1934, as amended (“Act”),¹ and sections 15.1(b) and 15.1(c) of the Commission’s rules (“Rules”)² by operating an intentional radiator not in accordance with Part 15 of the Rules³ and the device’s Equipment Authorization, without a license. We conclude that Ayustar is apparently liable for a forfeiture in the amount of twenty-five thousand dollars (\$25,000). We further order Ayustar to submit a sworn statement certifying that it is now operating its U-NII systems in compliance with FCC rules and applicable authorizations.

II. BACKGROUND

2. Part 15 of the Rules allows devices employing relatively low-level radiofrequency (“RF”) signals to be operated without individual licenses, as long as their operation causes no harmful interference to licensed services and the devices do not generate emissions or field strength levels greater than a specified level.⁴ Such devices must be authorized and operated in accordance with the Part 15 Rules.⁵ For example, section 15.5 of the Rules provides that operation of an intentional radiator must not cause harmful interference.⁶ If harmful interference occurs, the operation of the device must cease upon notification of such interference.⁷

¹ 47 U.S.C. §§ 301, 302a(b); *see also* 47 C.F.R. § 15.407.

² 47 C.F.R. § 15.1(b), (c).

³ 47 C.F.R. §§ 15.1 *et seq.*

⁴ *Revision of Part 15 of the Rules Regarding the Operation of Radio Frequency Devices Without an Individual License*, First Report and Order, 4 FCC Rcd 3491 (1989).

⁵ 47 C.F.R. §§ 15.1(a), 15.5.

⁶ 47 C.F.R. § 15.5.

⁷ *Id.*

3. Operating an RF device, such as an intentional or unintentional radiator, that is not in compliance with its authorization or the Part 15 Rules is a violation of section 302(b) of the Act.⁸ Additionally, operating a Part 15 device in a manner that is inconsistent with the Part 15 Rules requires a license pursuant to section 301 of the Act. Such operation without a license violates that provision.⁹

4. As part of its ongoing coordination efforts with the Federal Aviation Administration (“FAA”), the Enforcement Bureau received a complaint about radio emissions causing interference to the FAA’s Terminal Doppler Weather Radar (“TDWR”) installation serving the San Juan International Airport. TDWR installations exist at 45 major airports in the United States and Puerto Rico, and assist air traffic controllers in detecting low-altitude wind shear that can pose a risk to aircraft.¹⁰ In order to avoid interference to the FAA’s TDWR installations, the Commission requires that U-NII devices operating in the 5.25 – 5.35 GHz and 5.47 – 5.725 GHz bands have Dynamic Frequency Selection (“DFS”) radar detection functionality, which allows them to detect the presence of radar systems and avoid co-channel operations with radar systems.¹¹

5. On December 7, 2010, agents from the Enforcement Bureau’s San Juan Office (“San Juan Office”) conducted an investigation on the roof of the Miramar Plaza Condominium Building in Santurce, Puerto Rico. The agents from the San Juan Office confirmed by direction-finding techniques that radio emissions on the frequency 5626 MHz were emanating from the building’s roof, the location of one of Ayustar’s U-NII transmitters, a Motorola Canopy.¹² The Canopy model is certified for use as a Part 15E intentional radiator only in the 5745.0 – 5805.0 MHz band. The device also is not capable of DFS functionality.¹³

6. On December 8, 2010, agents from the San Juan Office again confirmed using direction-finding techniques that Ayustar’s U-NII radio transmitter on the roof of the Miramar Plaza Condominium Building was operating on the frequency 5626 MHz. The agents conducted additional tests and found that when Ayustar changed the frequency for its device to 5748 MHz, the interference to the TDWR ceased, thereby confirming that Ayustar’s operations were the source of the interference. According to Commission records, Ayustar does not hold a license to operate on the frequency 5626 MHz from the Miramar Plaza Condominium Building. Ayustar denied intentionally operating on the frequency 5626 MHz and asserted it did not know how such operation was possible.

⁸ 47 C.F.R. § 15.1(c); *see also* 47 U.S.C. § 302a(b).

⁹ 47 C.F.R. § 15.1(b); *see also* 47 U.S.C. § 301.

¹⁰ MIT Lincoln Laboratories, <http://www.ll.mit.edu/mission/aviation/faawxsystems/tdwr.html> (last visited Jan. 26, 2011).

¹¹ *See* 47 C.F.R. § 15.407(h)(2). *See also* 47 C.F.R. § 15.407(h)(2) (defining U-NII devices as “[i]ntentional radiators operating in the frequency bands 5.15-5.35 GHz and 5.470-5.825 GHz that use wideband digital modulation techniques and provide a wide array of high data rate mobile and fixed communications for individuals, businesses, and institutions.”). *See also* Memorandum from Julius Knapp, Chief, Office of Engineering and Technology, FCC, and P. Michele Ellison, Chief, Enforcement Bureau, FCC, to Manufacturers and Operators of Unlicensed 5 GHz Outdoor Network Equipment Re: Elimination of Interference to Terminal Doppler Weather Radar (TDWR) (dated July 27, 2010), *available at* http://www.wi-fi.org/files/FCC_Memorandum_on_UNII_Device_Operation_2010_07_27-M.pdf (last visited June 28, 2011).

¹² The device was a Motorola Canopy model # 5700, FCC ID ABZ89FC4816.

¹³ Because this device is not authorized to be used on the 5.25 – 5.35 GHz and 5.47 – 5.725 GHz frequency bands, the Rules do not require it to have DFS functionality when manufactured. Devices operating on the 5.25 - 5.35 GHz and 5.47 - 5.725 GHz frequency bands, however, must have DFS functionality. *See supra* note 10.

III. DISCUSSION

7. Section 503(b) of the Act¹⁴ provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation or order issued by the Commission thereunder, shall be liable for a forfeiture penalty. Section 312(f)(1) of the Act defines willful as the “conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.¹⁵ The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both section 312 and 503(b) of the Act¹⁶ and the Commission has so interpreted the term in the section 503(b) context.¹⁷ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹⁸ The term “repeated” means the commission or omission of such act more than once or for more than one day.¹⁹

8. Section 301 of the Act requires that no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio within the United States except under and in accordance with the Act and with a license.²⁰ Part 15 of the Rules,²¹ however, sets forth conditions under which intentional radiators may operate without an individual license. Pursuant to section 15.1(b) of the Rules, “the operation of an intentional or unintentional radiator that is not in accordance with the regulations in [Part 15] must be licensed pursuant to the provisions of section 301 of the Communications Act....”²² Thus, if an intentional radiator fails to comply with all of the applicable conditions set forth in Part 15 of the Rules, it is no longer covered by the unlicensed provisions of those Rules and must obtain an individual license pursuant to section 301 of the Act.

9. On December 7 and 8, 2010, as described above, agents from the San Juan Office observed an Ayustar Part 15E intentional radiator, Motorola Canopy operating on the center frequency of 5626 MHz from the roof of a building in Santurce, Puerto Rico. The device is not certified for use on that frequency. Therefore, Ayustar’s operations did not comply with either the Part 15 requirements or the Equipment Authorization and thus required a license. According to Commission records, however,

¹⁴ 47 U.S.C. § 503(b).

¹⁵ 47 U.S.C. § 312(f)(1).

¹⁶ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., section 503).... As defined ... ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in sections 312 and 503, and are consistent with the Commission’s application of those terms ...”).

¹⁷ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) (“*Southern California Broadcasting Co.*”).

¹⁸ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362 ¶ 10 (2001) (“*Callais Cablevision, Inc.*”) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

¹⁹ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.”

²⁰ 47 U.S.C. § 301.

²¹ See 47 C.F.R. §§ 15.1 *et seq.*

²² 47 C.F.R. § 15.1(b).

Ayustar does not hold a license to operate on the frequency 5626 MHz in Santurce, Puerto Rico. Although Ayustar denies knowing it was operating on the frequency 5626 MHz, Ayustar does not deny knowingly operating its Part 15E intentional radiator, Motorola Canopy on the building rooftop in Santurce, Puerto Rico. Thus, based on the evidence before us, we find that Ayustar apparently willfully and repeatedly violated section 301 of the Act and section 15.1(b) of the Rules by operating an unlicensed radio transmitter on December 7 and 8, 2010.

10. Section 15.201(b) of the Rules²³ provides that all intentional radiators operating under Part 15 shall be certificated by the Commission. Section 15.1(c) of the Rules²⁴ states that the operation of an intentional radiator that is not in compliance with the administrative and technical provisions in this part is prohibited. Section 302(b) of the Act provides that “[n]o person shall . . . use devices which fail to comply with the regulations promulgated pursuant to this section.”²⁵ Consequently, the operation of an intentional radiator in a manner inconsistent with the Part 15 Rules is a violation of section 302(b) of the Act. Section 15.504(h)(2) of the Rules²⁶ requires U-NII devices operating in the 5.47 – 5.725 GHz band to employ DFS. Ayustar operated a U-NII transmitter that was incapable of operating with the DFS radar detection mechanism required under section 15.407(h)(2) of the Rules. Thus, based on the evidence before us, we find that Ayustar apparently willfully and repeatedly violated section 302(b) of the Act and section 15.1(c) of the Rules by operating a U-NII transmitter without DFS capability on a frequency for which it was required on December 7 and 8, 2010.²⁷

11. Pursuant to the Commission’s *Forfeiture Policy Statement* and section 1.80 of the Rules, the base forfeiture amount for operation without an instrument of authorization is \$10,000, and the base forfeiture amount for operation of unauthorized equipment is \$5,000.²⁸ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.²⁹

12. Because Ayustar caused interference to the San Juan International Airport’s TDWR and posed a safety hazard to air traffic, we believe an upward adjustment in the forfeiture amount for Ayustar’s apparent unlicensed operation is warranted. On March 11, 2009 and August 22, 2009, Ayustar operated Part 15 radio transmitters manufactured by Motorola in the same unauthorized frequency band and caused interference to the TDWR at the San Juan Airport,³⁰ the very same activity at issue today. Accordingly, we find Ayustar’s apparent violation to be egregious and deserving of an additional upward adjustment. Based on these factors, we find that \$10,000 is an appropriate upward adjustment for Ayustar’s apparent unlicensed operation, resulting in a \$20,000 proposed forfeiture for this apparent violation. We propose the base forfeiture amount (\$5,000) for Ayustar’s operation of unauthorized equipment in apparent violation of section 302(b) of the Act and section 15.1(c) of the Rules.

²³ 47 C.F.R. § 15.201(b).

²⁴ 47 C.F.R. § 15.1(c).

²⁵ 47 U.S.C. § 302a(b).

²⁶ 47 C.F.R. § 15.407(h)(2).

²⁷ 47 C.F.R. § 15.1(c).

²⁸ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

²⁹ 47 U.S.C. § 503(b)(2)(E).

³⁰ *See Ayustar Corporation*, Forfeiture Order, 25 FCC Rcd 945 (Enf. Bur.), *recon. denied*, 25 FCC Rcd 16249 (Enf. Bur. 2010).

13. Although we could impose larger upward adjustments for Ayustar's apparent violations, we decline to do so based on the particular circumstances of this case. We caution Ayustar and other U-NII service providers, however, that we may do so in future cases if the circumstances warrant or if our current approach does not serve as a sufficient deterrent. Applying the *Forfeiture Policy Statement*, section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Ayustar is apparently liable for a total forfeiture of \$25,000 consisting of the following: \$20,000 for unlicensed operation in violation of section 301 of the Act and section 15.1(b) of the Rules, and \$5,000 for operation of unauthorized equipment in violation of section 302(b) of the Act and section 15.1(c) of the Rules.

14. We direct Ayustar to submit a statement signed under penalty of perjury by an officer or director of Ayustar stating that it is currently operating its U-NII transmitter located on the rooftop of the Miramar Plaza Building in Santurce, Puerto Rico consistent with the Part 15 requirements and the Equipment Authorization. Ayustar shall also provide the frequency on which its U-NII transmitter is operating. This statement must be provided to the San Juan Office at the address listed in paragraph 20 within thirty days of the release date of this Notice of Apparent Liability for Forfeiture and Order.

IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that, pursuant to section 503(b) of the Communications Act of 1934, as amended, and sections 0.111, 0.311, 0.314 and 1.80 of the Commission's Rules, Ayustar Corporation is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twenty-five thousand dollars (\$25,000) for violations of sections 301, and 302(b) of the Act and sections 15.1(b) and 15.1(c) of the Rules.³¹

16. **IT IS FURTHER ORDERED** that, pursuant to section 1.80 of the Commission's Rules, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Ayustar Corporation **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

17. **IT IS FURTHER ORDERED** that, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Ayustar Corporation **SHALL SUBMIT** a sworn statement as described in paragraph 14 to the San Juan Office listed below.

18. Ayustar Corporation is **HEREBY NOTIFIED** that its operation of a Motorola Canopy transceiver resulted in harmful interference to the FAA's TDWR system that serves the San Juan International Airport. Ayustar is **HEREBY WARNED** that any further operation of any U-NII device, including the Motorola Canopy transceiver, on any frequency, and at any location, that results in interference to the FAA's TDWR system serving the San Juan International Airport may be considered a willful violation of section 333 of the Act, which prohibits willful or malicious interference to any radio communication of any station licensed or authorized under the Act or operated by the United States Government.³²

19. Payment of the forfeiture must be made by credit card, check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the Account Number and FRN referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO

³¹ 47 U.S.C. §§ 301, 302a(b), 503(b), 47 C.F.R. §§ 0.111, 0.311, 0.314, 1.80, 15.1(b), 15.1(c).

³² 47 U.S.C. § 333.

63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.³³ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov. Ayustar shall send electronic notification on the date said payment is made to SCR-Response@fcc.gov.

20. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to sections 1.80(f)(3) and 1.16 of the Rules.³⁴ The written statement must be mailed to Federal Communications Commission, Enforcement Bureau, South Central Region, US Federal Building, Room 762, San Juan, PR, 00918-1731 and must include the NAL/Acct. No. referenced in the caption. The statement should also be emailed to SCR-Response@fcc.gov.

21. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

22. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and regular mail, to Ayustar at POB 16892, San Juan, PR 00908-6892.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau

³³ See 47 C.F.R. § 1.1914.

³⁴ 47 C.F.R. §§ 1.80(f)(3), 1.16.